IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA No.450/SRT/2023

Assessment Year: (2011-12)

(Physical Hearing)

Viral Lavjibhai Patel, A-18, Naginawadi Society, Sumul Dairy Road, Surat – 395004.	**Vs.**	Income Tax Officer, Ward-3(3)(5), Surat, Aaykar Bhawan, Majura Gate, Opp. New Civil Hospital, Surat-395001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **ALVPP2897E**		
(Appellant)		**(Respondent)**

Appellant by	Shri Sapnesh Sheth, CA
Respondent by	Shri Vinod Kumar, Sr. DR
Date of Hearing	12/10/2023
Date of Pronouncement	26/10/2023

आदेश / O R D E R

PER DR. A. L. SAINI, AM:

Captioned appeal filed by the assessee, pertaining to Assessment Year (AY) 2011-12, is directed against the order passed by the National Faceless Appeal Centre, Delhi [in short 'NFAC/Ld.CIT(A)'], dated 16.06.2023, which in turn arises out of an assessment order passed by Assessing Officer u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), dated 30.12.2018.

2. The grounds of appeal raised by the assessee are as follows:

"1. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A), NFAC has erred in confirming the action of assessing officer of reopening assessment by issuing notice u/s 148 of the I.T. Act, 1961.

2. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A), NFAC has erred in confirming the action of assessing officer in passing ex-parte order u/s 144 of the I.T. Act, 1961.

3. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A), NFAC has erred in confirming the action of assessing officer in making addition of Rs.2,52,05,768/- u/s 68 as unexplained cash credit under the IT Act.

4. It is therefore prayed that above addition made by assessing officer and confirmed by Commissioner of Income-tax (Appeals) may please be deleted.

5. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of appeal."

3. At the outset, Ld. Counsel for the assessee informs the Bench that assessee does not wish to press ground no.2, therefore we dismiss the ground no.2, as not pressed.

4. Succinct facts *qua* the issue are that assessee before us is an individual and had not filed his original return of income for assessment Year (A.Y.) 2011-12, u/s 139 of the Act. The Assessing Officer observed that assessee's return was appearing in NMS data Cycle-2 and as per the AIR information available in the assessee`s case, it was gathered that the assessee had deposited cash of Rs.55,73,500/- on different occasion, during A.Y, 2011-12, in his Akhand Anand Bank Ltd account. As the assessee`s ITR for A.Y 2011-12 was not found filed therefore, a query letter was issued on 23.02.2016 by the Assessing Officer. In response to said letter issued, assessee neither submitted any details nor attended in the case before the Assessing Officer.

5. Therefore, subsequently, the assessee's case was reopened by issuing a notice u/s 148 of the Act, on 28.03.2018. The notice was duly served upon the assessee. From the CIB data available in the assessee`s case it was noticed by Assessing Officer that the assessee had deposited cash of Rs.55,73,500/- on different occasions in his bank account maintained with Akhand Anand Bank Ltd, during the

F.Y. 2010-11 relevant to A.Y. 2011-12. On verification of the record available in the assessee`s case, it was noted by the Assessing Officer that the assessee had not filed his return of income for A.Y 2011-22. Due to failure of the assessee to file the Return of Income, the source of cash deposit was not found explained. As the source of cash deposits was neither found disclosed nor offered for taxation, therefore, total amount of Rs.55,73,500/- had remained to be taxed. Accordingly, the assessee's case for A.Y. 2011-12 was reopened u/s 147 of the Act, after obtaining the prior approval of the Ld.Pr. CIT-3, Surat. Before reopening the case, the reasons were duly recorded and subsequently, notice u/s 148 of the Act was issued on 28.03.2018. The notice issued was duly served upon the assessee. Thereafter, notices u/s 142(1) of the Act was issued on 09.08.2018.

6. In response to the show cause notices, the assessee submitted the reply alongwith details on 05.12.2018. However, the Assessing Officer noted that assessee has not submitted complete documentary evidences, to explain the source of credit entries therefore, Assessing Officer noted that assessee had failed to substantiate the source of credit entries made in his bank account. Therefore an addition of Rs.2,52,05,768/- was made to the total income of the assessee u/s 68 of the Act.

7. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before the ld. CIT(A) who has confirmed the addition made by the Assessing Officer. The ld CIT(A) upheld the reopening of the assessee`s case u/s 147 of the Act, as valid. However, on merit, the NFAC/ld CIT(A) noted that assessee has failed to explain the source of debit and credit entries in the bank account, therefore

NFAC/ld CIT(A) confirmed the addition made by the Assessing Officer.

8. Aggrieved by the order of NFAC/ld. CIT(A), the assessee is in further appeal before us.

9. Shri Sapnesh Sheth, Learned Counsel for the assessee, vehemently argued that there is no whisper in the reasons recorded, of any tangible material which came to the possession of the Assessing Officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred u/s 147 of the Act. The ld Counsel further contended that Assessing Officer was not having any material information to form "*a reason to believe*" that there was an escapement of income. The ld Counsel further submitted that cash deposit in the bank account is not an income of the assessee, which has escaped assessment, for that ld Counsel relied on the judgment of Hon'ble ITAT, Delhi bench in the cases of Bir Bahadur Singh Sijwali v. ITO 68 SOT 197 and Mahavir Parsad v ITO- ITA N0.924/Del/2015 dated 09.10.2017.The ld Counsel also stated that Assessing Officer was not having sufficient material to form the "*reason to believe*" at the time of re-opening of the assessment, therefore, reopening of assessment may be quashed.

10. On merit, ld Counsel submitted that assessee`s nature of business is cheque discounting business and in such business there is hardly a margin, therefore addition may be sustained at the rate of 1% of total credit in the bank account. Alternatively, ld Counsel stated that peak credit in the bank account may be sustained as an addition in the hands of assessee.

11. On the other hand, ld DR for the Revenue argued that Assessing Officer had information in his hand about the deposits made in the bank account. The bank had provided the information as part of Annual Information Return (AIR) to comply with the provisions of Section 285BA and the authenticity of information is backed by the KYC details submitted by the assessee to the bank. Therefore, the information received from the assessee's bank is the basis for the formation of belief coupled with non-filing of return, hence reopening of assessment is valid.

12. On merit, ld DR for the Revenue argued that entire addition made by the Assessing Officer may be sustained.

13. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the NFAC/ld. CIT(A) and other material brought on record. So far the argument of ld Counsel that reassessment proceedings u/s 147 of the Act is bad-in-law, we note that NFAC/ld CIT(A) has passed a speaking order upholding the validity of reassessment proceedings, the findings of NFAC/ld CIT(A) are reproduced below:

> *"17.0 Ground No.1: The ground is related to the technical issue of reopening. The appellant had submitted that the AO should not come to a conclusion of escapement of income only based on the non-filing of the return of income and cash deposits made in the bank account. He argued that there shall be cogent evidence on record indicating the cash deposits made are from unaccounted sources. Further stated that, the sources of cash deposits may be from various sources such as exempted income, savings of the earlier years. I do not find force in this argument of the appellant for several reasons. If the assessee had exempted income, the same had to be claimed in the return of income either in the earlier years or in the current AY. Whether the sources of cash deposits are subjected to*

tax or exempted from tax, the same must be reflected in the return of income in the year of receipt. If the assessee had past savings, the same will be known from the earlier returns of income. In fact, the assessee himself had admitted before the AO that in the earlier years, he had meager incomes. So, he can't take a hypothetical stance and say that he may be having the savings or exempted incomes to make cash deposits in the bank account. Further, there must be a source of information in front of the AO before recording the reasons to believe that there is an escapement of income. Though the assessee had not fulfilled the conditions to obtain the reasons recorded such as not filing the return in response to the notice issued u/s 148. To be fair and showing unbiased nature of action, the AO had supplied the reasons for the reopening suo moto. The copy of the reasons is not submitted for examination during the appeal proceedings. Therefore, to adjudicate the appeal I have to depend solely on the assessment order. The reasons made available in the assessment order are considered and it is concluded that the reasons recorded were after thoroughly verifying the records available with the AO. As seen from the reasons narrated, it appears that there is no presumption or assumption against the assessee in reopening the case. When the twin situations are fulfilled viz. not filing the return of income and huge cash deposits which are disproportionate to the amounts of income admitted in the returns of earlier years; I find this is the sufficient reason to reopen the case u/s 147. In this connection, the appellant had referred two case laws of Hon'ble ITAT, Delhi bench in the cases of Bir Bahadur Singh Sijwali v. ITO 68 SOT 197 and Mahavir Parsad v ITO- ITA N0.924/Del/2015 dated 09.10.2017.

17.01 With due respect to the decisions of the non-jurisdictional Hon'ble ITAT, Delhi, I find that the legal issue raised now was not raised before the AO though the reasons were provided to assessee before he files the return in response to the notice issued u/s 148. The reasons for reopening available with the assessee were not submitted during the appeal proceedings. Therefore, while adjudicating the issue of reopening, I need to confine to the information available in the assessment order. At this juncture, it is required to look into the broad principles laid out by the various high courts and Apex Court as given below along with analysing the facts of the case on hand.

- *While recording the reasons, the AO need not establish the escapement of income: -*
  The AO found that the assessee did not file the return for the relevant AY. At the stage of reopening the case, there is a sufficient material in possession of AO showing several bank account transactions which shows the potential of having income beyond basic exemption limit. There is no need to establish the exact quantum of income escaped because of not filing the income. Unless the return is available to the AO, the escapement of income cannot be ascertainable. So, quantification of escapement of income will take place only at the time of conclusion of assessment of income.

- *The belief at that time is only prima facie and not conclusive. Reasons should not depict gossip, rumour or suspicion. The belief must be held in good faith; it cannot be merely a pretence: -*
  There are huge cash deposits and credits in the bank account as per the information received by the AO. The AO cross verified the information received with the relevant year records of the assessee available with the Department. The case was considered for reopening based on the credible information uploaded by the bank and the same is made available by the Department for action by the respective AO. There is no iota of doubt in this case to show that the AO had relied on some gossip, rumour from any corner or reopened the case merely on suspicion. Since the assessee had not filed the return and deposited huge amounts in bank account, there is a basis for belief on good faith to arrive a right conclusion of income escaped from assessment.
- *The expression "believe" in Section 147 requires an objective satisfaction based on definite material and information, howsoever insufficient it is. The sufficiency of the material cannot be gone into, but relevancy certainly can be gone into. The reasons for the belief should have a rational connection or a relevant bearing on the formation of the belief and should not be extraneous or irrelevant. That is, there must be live nexus between information, assesses and escaped income: -*

  The AO had information in his hand about the deposits made in the bank account. The bank had provided the information as part of Annual Information Return (AIR) to comply with the provisions of Sec.285BA and the authenticity of information is backed by the KYC details submitted by the assessee to the bank. Therefore, the information received from the assessee's bank is the basis for the formation of belief coupled with non-filing of return. If assessee had filed the return admitting the income or loss from the business transactions, the reopening the case without making further enquiries could have led to a conclusion that there was no belief but existence of suspicion. The information received is certainly a relevant and sufficient material to consider the case to be reopened. It is irrational if the AO has not considered of reopening the case even after having the credible information in his hands when the fact of non-filing of return is staring at him. There is a live connection between the .information of credit entries in the bank account and non-filing of return. I do not see any more relevant information is required in this case to believe that there is an escapement of income.

17.02 Assessee filed two decisions as stated in the earlier paragraphs of the order. Merely filing of judicial decisions claiming that the facts in those cases are similar to the case of appellant is not convincing. The facts of each case are different. To say it further clear, on the face of records of earlier years, the incomes reported to the Department are very meagre. There is no possibility for the assessee to make many bank account

transactions without resulting into a profit or generating income beyond basic exemption limit. The quantum of cash deposits vis-a-vis the returned incomes of the earlier years would certainly lead to a belief of escapement of income. In this particular case, the incomes admitted in the earlier years are just above the basic exemption limit. In such a scenario, a person depositing the cash/cheques to the extent of almost 20 times (before considering the two other undisclosed accounts in the bank) that of earlier returned income is the sufficient reason. The basis for reopening cannot be said to be suspicious by measure of any parameter. Further, it is not proper to expect each and every sentence of reasons recorded shall explicitly analyses to reach a conclusion of escapement of income. It is the primary duty of the AO to analyse the information received from any source. For such purpose he has to compare the information with the records available with him. If the prima facie examination of fresh information leads to a foundation for inference of income escapement, the AO can write a brief reason and reopen the case. The proceedings initiated with such a foundation be enough to treat for fulfilling the conditions laid down in the Sec. 148. Since the amounts of income admitted in the earlier years by the taxpayers in the cases relied on by the appellant are not available for comparison, the same cannot be blindly followed. Suppose, if any taxpayer had submitted a return with Rs.10's of lakhs in the earlier year and deposited an amount of Rs.4 to 5 lakhs in his bank account without filing the return for the AY relevant to the cash deposits, the act of reopening of the case can be said to be made on suspicion not based on reasons to believe. The case of the assessee is not having such facts. The admission of meager incomes in the earlier AY returns certainly forms a basis for belief that there is an escapement of income in the assessee's case. Therefore, the ground of appeal raised on the reopening of the case without having proper reasons is considered as not having merits according to the discussion above and the corresponding ground ***is dismissed.***

14. We have gone through the above findings of NFAC/ld CIT(A) and noted that NFAC/ld CIT(A) has considered the arguments of the assessee and then reached on a right conclusion. The arguments made by ld Counsel for the assessee, before us, have already been dealt and considered by NFAC/ld CIT(A). On a careful reading of the NfAC/ld.CIT(A) order and the findings thereon, we do not find any valid reason to interfere with the decision and findings of the NFAC/ld.CIT(A), so far technical issue of reopening of assessment u/s 147 is concerned. Hence, we dismiss ground No.1 raised by the assessee.

15. Coming to ground No. 3 raised by the assessee on merit, we note that entire credit entries in the bank statement should not be treated as "income" of the assessee and it would be appropriate to note the background of the assessee`s case. We note that assessee is engaged in cheque discounting business and to prove this, the assessee has submitted before us following documents and evidences, *viz*: (1) Written submission filed before NFAC/Ld.CIT(A), contending that assessee is in cheque discounting business (vide Pb.1 to 5), (2) Letter filed before Assessing Officer stating that assessee is in cheque discounting business, (vide Pb.6 to 7), (3) Letter filed before Assessing Officer (vide Pb.8 to 9), (4) Bank statement of assessee in respect to accounts maintained with Akhand Anand Co-Operative Bank Ltd:-

- Current account no. 1001201003683 (vide Pb.10 to 30)
- Current account no.1001201003671 (vide Pb.31 to 54)
- Current account no.1001201004230 (vide Pb. 55 to 61)

16. After going through the above bank statements and frequency of deposits and withdrawals in bank statements, it can be said that assessee was engaged in cheque discounting business. Mere fact of cash deposit in bank account cannot lead to the inference that there is escapement of income in absence of any other evidence on record. It was also observed that there can be several source of cash deposit in bank account and unless and until it is brought out in the reasons recorded for reopening assessment that the cash deposit represents income from undisclosed sources. The assessee has been maintaining right from the beginning that he was in the cheque discounting business.

17. We note that in the course of appellate proceedings, it was submitted that during the course of assessment proceedings it was clearly explained that assessee is engaged in job work activity and also explained that due to cash crunch assessee has discounted self cheques and cash/cheque received from Shroff was deposited in bank. Such transactions were frequently done so as to ensure that cheques given to Shroff for discounting is subsequently cleared and the business requirement is met. It was also pointed out that there was not much balance in his bank account and therefore, the modus operandi stands explained. On perusal of bank statement of assessee, it is quite evident that after cash/cheque deposit, cheques have been issued immediately. In respect of such transactions, it is not possible to file any documentary evidences and inference has to be drawn on the basis of modus operandi of the transaction and the circumstantial evidences. Here, reliance is placed on following case laws wherein under identical facts, cheque discounting activity has been taken into consideration and entire cash/cheque deposit has not been regarded as income and only percentage (%) of profit has been taxed:

- Manoj Agarwal V DCIT - 113 ITD 377 (Del)
- DCIT V Anil J. Kothari - ITA No. 2645/Ahd/2013
- ITO V Mahesh T. Patel - ITA no. 2285/Ahd/2015/Srt
- Rohit Pravinchandra Panwala - IT (SS) A no. 608 to 612/Ahd/2010
- ITO V Rajpal Singh Shekhawat - ITA No. 1399/Ahd/2011

In the above cases, only % of commission ranging from 0.15% to 0.50% of total amount was held to be taxable.

18. It was further submitted by ld Counsel that addition on account of entire credit entries reflected in bank statement can never be made. The

addition, if any, can be made only to the extent of peak credit balance Rs.1,38,029/- on 02.11.2010 (A/c no. 1001201003683) vide paper book page No.27, Rs.36,137/- on 04.02.2011 (A/c no. 1001201004230), vide paper book page no.59 and Rs.1,99,431/- on 04.09.2010 (A/c no. 1001201003671), vide paper book page no.51. This fact itself indicates that assessee has not earned such huge income otherwise his bank balance would not have remained at a meagre figure. In support of the contention that addition can be made only in respect of peak credit balance, Reliance is placed on following ITAT Surat and Ahmedabad bench decisions:

- Gaurangbhai V. Sojitra HUF – ITA No. 1865/A/2015/SRT dated 12.07.2018
- Mahesh J. Ramani V. ITO – ITA No. 1347/Ahd2014/SRT dated 16.10.2018
- Smt. Manjulaben Champaklal V. ITO – ITA No. 1155/Ahd/2011
- Saurin Nandkumar Shodhan v.ITO - ITA No.2075/Ahd/12
- Patel Prahladbhai Harjivanbhai v. ITO – ITA No. 2347/Ahd/12
- Smt. Jully Bajaranglal Nahar –ITA No. 829/Ahd/2013
- Maheshkumar B Patel V. ITO – ITA No. 994/A/12
- ITO V. Bhavesh B. Mehta - 56/A/13 & 106/A/13

19. Thus, in view of above submission and judicial pronouncements, we note that in assessee`s case addition should be sustained to the extent of peak credit in the bank accounts, which is as follows:

(i) Peak credit balance Rs. 1,38,029/- on 02.11.2010 (A/c no. 1001201003683), vide paper book page No.27

(ii) Peak credit balance Rs. 36,137/- on 04.02.2011 (A/c no. 1001201004230), vide paper book page no.59.

(iii) Peak credit balance Rs. 1,99,431/- on 04.09.2010 (A/c no. 1001201003671), vide paper book page no.51.

Therefore, total addition comes to Rs.3,73,597/- (*Rs.1,38,029 + Rs. 36,137 + Rs.1,99,431*). We note that the peak credit in the bank account during the year is considered for making such additions. It is a measure to ensure that any unexplained credits during the year are taken into account. Therefore, respectfully following the decisions of ITAT Surat Bench and Ahmedabad Bench, as cited above, we direct the Assessing Officer to make addition in the hands of assessee to the tune of Rs. 3,73,597/- and assessee gets partial relief. Thus, ground No.3 is partly allowed.

20. In the result, assessee`s appeal is partly allowed in above terms. Order is pronounced on 26/10/2023 in the open court.

Sd/-	Sd/-
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

सूरत /Surat
दिनांक/ Date: 26/10/2023
SAMANTA
Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
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By Order

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ITAT, Surat